## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: June 9, 2000

TO : James J. McDermott, Regional Director

Region 31

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Northridge Hospital Medical Center 512-5012-0133

Case 31-CA-24266 512-5012-0133-1600

512-5012-1725-1167 512-5012-1183

512-5012-2200

512-5012-6712-3300 512-5012-8380-5000

512-5072-3900

This Section 8(a)(1) case was submitted for advice on whether the Employer violated the Act by prohibiting an employee from distributing a pro-union handbill at the entrance to its Hospital.

We conclude, based on the facts in the Region's Request for Advice dated March 29, that Northridge Hospital Medical Center (the Hospital) violated Section 8(a)(1) when it prohibited employee Orda from distributing pro-union handbills at the Hospital entrance on December 3, 1999.

The Hospital based its prohibition on its no solicitation/no distribution rule, which has been in effect since 1998. The rule prohibits employees from soliciting or distributing any literature, for any purpose, at any time, in any patient care area. "Patient care" areas include "patient rooms, operating rooms, therapy rooms, recovery rooms and other areas used for patient care, corridors adjacent to those areas, sitting rooms on patient floors that are accessible to and used by patients, and elevators, corridors and stairways used to transport patients."

<sup>&</sup>lt;sup>1</sup> The rule also defines "working areas," although it does not state that solicitation/distribution are prohibited in working areas. "Working areas" include "all areas where employees regularly work, but do not include areas such as employee lounges, lunch rooms, lobbies, vending areas, and parking areas."

Employee Orda, an off-duty Registered Nurse, distributed Union literature just outside the front entrance to the Roscoe Boulevard campus of the Hospital at about 7 p.m. The Hospital asserted that it was justified in banning her activity because she was distributing in a patient care area, in an area where employees regularly work, and an area covered by its "access/loitering" policy.<sup>2</sup>

In <u>Beth Israel Hospital</u>, <sup>3</sup> the Supreme Court approved the Board's presumption that an employer rule which prohibits solicitation in health care facilities in areas other than immediate patient areas is invalid. The Court held that the Board's general approach requiring health care facilities to permit solicitation and distribution during nonworking time in nonworking areas, where the facility had not justified the prohibition as necessary to avoid disruption of health care operations or disturbance of patients, was consistent with the Act. The Court found that the employer had not met its burden to establish that the prohibition was necessary to prevent the disruption of patient care.

One year later, the Supreme Court reviewed the Board's standard again in <u>NLRB v. Baptist Hospital</u>.<sup>4</sup> In that case, the Court found that the hospital had demonstrated through expert testimony that its rule, which extended the prohibition on solicitation to corridors and sitting rooms on patient floors, was needed to maintain a tranquil atmosphere conducive to patient care.<sup>5</sup> The Court, however, approved the Board's finding a violation with regard to the cafeteria, gift shop, and lobbies on the first floor

<sup>2</sup> The "access/loitering" policy which is listed among the "Standards/Rules of Conduct" in the Hospital's Human Resources policy states that employees are to: "Leave hospital property after assigned work/educational shift; return to the hospital for personal/family medical; patient/family member hospital visitation purposes; or hospital sponsored/approved events only."

<sup>&</sup>lt;sup>3</sup> Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978).

<sup>&</sup>lt;sup>4</sup> NLRB v. Baptist Hospital, Inc., 442 U.S. 773 (1979).

<sup>&</sup>lt;sup>5</sup> <u>Id.</u> at 783. See also <u>Baylor University Medical Center v.</u> <u>NLRB</u>, 662 F.2d 56, 61 (D.C. Cir. 1981).

because the hospital had not presented clear evidence showing how often patients used these areas.<sup>6</sup>

In Intercommunity Hospital, 7 the Board further explained its approach to balancing employee organizational rights with a hospital's need to deliver patient care services. The Board acknowledged that in a general sense every area of a hospital serves to further patient care, but stated that in order to lawfully ban union solicitations, a hospital must show that "the areas in question serve important and direct functions in the care of patients."8 Thus, solicitation may lawfully be prohibited "where it is shown that it would tend to directly affect patient care by disturbing patients or disrupting health services." In <a href="Intercommunity Hospital">Intercommunity Hospital</a>, the Board found that the hospital had justified its prohibition on solicitation in the halls and corridors adjacent to patient rooms, and in nurses stations, because those areas were either used for overflow treatment of patients, patient transport, or were areas so close to patient rooms that patients could overhear solicitations there. 10

Applying this standard, the Board and courts have found that rules which prohibited employee solictation in non-patient care areas, including at hospital entrances, violated the Act. 11 In each of these cases, the Board found

<sup>&</sup>lt;sup>6</sup> Id. at 786.

<sup>&</sup>lt;sup>7</sup> Intercommunity Hospital, 255 NLRB 468 (1981).

<sup>&</sup>lt;sup>8</sup> Id. at 471.

<sup>9</sup> Id. at 471-472.

<sup>10</sup> See also St. Vincent's Hospital, 265 NLRB 38, 56 (1982) (exceptions not taken to finding that rule prohibiting union solicitation in conference room near ICU was lawful because conference room was near patient rooms and was used for private treatment discussions between doctors and patients' families).

<sup>11</sup> See <u>Harper-Grace Hospitals</u>, <u>Inc.</u>, 264 NLRB 663, 665-66 (1982), enfd. 737 F.2d 576 (6th Cir. 1984); <u>Presbyterian/St. Lukes's Medical Center</u>, 258 NLRB 93, 98-99 (1981), enfd. 723 F.2d 1468, 1473-1474 (10th Cir. 1983); <u>Southern Maryland Hospital</u>, 293 NLRB 1209, 1219 (1989),

that the hospital failed to show that the solicitation or distribution activity tended to directly affect patient care by disturbing patients or disrupting health services.

Here, we conclude that Northridge has not met its burden of showing that Orda's distribution at the front entrance disturbed patients or disrupted patient care. There is no evidence that treatment went on in this area. The Employer's mere argument that the entrance is close to patient care areas is insufficient, since there is no evidence that patients being treated in the nearby clinics could hear conversations at the entrance. There is also no showing that Orda's activity at the entrance affected patient care. This entrance is distinguishable from areas where the Board has found solicitation and distribution could be prohibited because of interference with patient care. Thus, the Hospital could not lawfully prohibit Orda from distributing handbills there. 12

The Hospital's assertion that it could lawfully prohibit Orda from distributing at the front entrance because she violated its access/loitering rule also has no merit. The Hospital asserts that Orda was off-duty and was only entitled to be on the premises to vote. It is well settled that "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking area will be found invalid." Since the entrance is not a patient care area, or a working area, the Hospital has not presented a valid business justification for denying Orda access to its exterior property while she was off-duty. The Hospital asserts that its "access/loitering" policy was implemented to reduce the number of people loitering on the grounds and to thereby enhance security and minimize petty theft and

enfd. in relevant part 916 F.2d 932, 935-936 (4th Cir. 1990).

<sup>12</sup> We also reject the Hospital's argument that this is a "work area," in which it can lawfully prohibit distribution, since employees stand briefly at the entrance when wheeling out discharged patients. We note that the Employer's rule excludes "lobbies" from the definition of "work area," where employees also "briefly" stand with or wheel out discharged patients; the Hospital has advanced no rational reason why the entrance but not the adjacent lobby is a "work area."

<sup>13</sup> Tri-County Medical Center, 222 NLRB 1089 (1976).

vandalism. The Board has consistently rejected the argument that concerns about security, vandalism and theft were sufficient business justifications to prohibit offduty employees from the exterior premises in the absence of specific evidence of a problem for which the employer's denial of access to off-duty employees was a reasonable solution. 14

For these reasons, the Region should issue complaint, absent settlement, alleging that the Hospital violated Section 8(a)(1) by prohibiting employee Orda from distributing Union handbills at the front entrance of its facility.

B.J.K.

14 See e.g. <u>Eagle-Picher Industries</u>, 331 NLRB No. 14, slip op. at 6 (May 19, 2000) (vandalism); <u>ITT Industries</u>, 331 NLRB No. 7, slip op. at 4 (May 10, 2000) (vandalism); <u>United Parcel Service</u>, 318 NLRB 778, 787-788 (1995) (vandalism/security); <u>Postal Service</u>, 318 NLRB 466, 467-468 (1995) (security); <u>Fairfax Hospital</u>, 310 NLRB 299, 309 (1993) (assault/vandalism/theft); <u>Orange Memorial Hospital</u> Corporation, 285 NLRB 1099, 1100 (1987) (patient security).